CHANGE OF POSITION AS A DEFENSE IN QUASI-CONTRACTS—THE RELATION OF IMPLIED WARRANTY AND AGENCY TO QUASI-CONTRACTS.

THAT the subject of change of position as a defense to the action for money had and received is confused, seems at first sight strange. The obligation to repay money paid to one by mistake of a material fact is quasi-contractual, since it exists regardless of consent and yet may be enforced in a contract action, and since it is imposed by law because *ex aequo et bono* the defendant ought to pay the money. Though the money is recoverable in an action at law, because common law judges saw fit to allow a remedy at law instead of requiring the plaintiff to bring a suit in equity, the right is essentially equitable.[1] On principle, therefore, whenever the defendant can show that in equity and good conscience he ought not to be required to repay, the obligation to repay should be held no longer to exist, even if it did exist prior to the time when the defendant's equitable defense arose.[2] This conclusion is inevitable because the obligation is in no sense contractual, — it is called *quasi*-contractual to avoid any danger of confusing it with genuine contractual obligations, — but, being implied by law in the interests of justice, it must be terminated by law when the interests of justice so require. Were it not, therefore, for certain applications of the doctrine of implied warranty in the law of sales and in the law of transfers of negotiable paper, and for the existence of a kindred doctrine in the law of agency, so great a change of position on the part of an innocent recipient of money paid by mistake of fact as to make his refusal to repay it as equitable as is the other party's demand for repayment, would probably everywhere be conceded to be a complete defense to the

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[1] "In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." Lord Mansfield, in Moses *v.* Macferlan, 2 Burr. 1005, 1012.

[2] "The action for money had and received . . . takes the place of a bill in equity and should be encouraged within proper limits. It should not be extended, however, to cases in which the defendant may be deprived of any right or subjected to any inconvenience thereby." Allen, J., in Rathbone *v.* Stocking, 2 Barb. (N. Y.) 135, 145. See Buller, J., in Straton *v.* Rastall, 2 T. R. 366, 370.

other party's demand for restitution. It is accordingly essential to get at the reason why doctrines of warranty and of agency interfere with the application of general equitable principles, if we are to bring order out of apparent chaos. On that account the following explanation, new in statement though it may be, is offered in the hope that it will make clear why there is conflict on the subject of change of position.

I.

THE RELATION OF IMPLIED WARRANTIES TO QUASI-CONTRACTS.

Is an implied warranty a contract implied in fact or an obligation implied in law? This question is important, because if an implied warranty is a contract implied in fact it rests in theory on the ascertained intention of the parties,[1] whereas if it is an obligation implied in law it rests on the supposed requirements of "eternal justice"; and because a thing implied on account of the presumed intention of the parties must be held to override, as effectually as an express contract would, any obligation which in the absence of an actual contract the law, in the interests of justice, would imply.

The definitions of implied warranties say that they are created or arise by operation of law, and yet are genuine contracts.[2] But if they are contracts implied in fact, why say that they are created

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1 "It seems to me that whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted." Lord Esher, M. R., in *Ex parte* Ford, 16 Q. B. D. 305, 307.

2 "A warranty is an express or implied statement of something which the party undertakes shall be part of the contract, yet collateral to the express object of it." Lord Abinger, in Chanter *v.* Hopkins, 4 M. & W. 399, 404.

"Implied warranties are created by law or spring from the facts existing at the time of sale; from what the parties did rather than from what they said. They are contracts, to be sure, but silent contracts." Bennett's note to Benjamin on Sales, 7 Am. ed., 672.

"Implied warranties are such as arise by operation of law, and an implied warranty may be defined as a contract or agreement which the law imputes to the seller by reason of the nature, circumstances, or subject-matter of the contract of sale." 2 Mechem, Sales, § 1295.

"We may say, generally, that the law implies a warranty in sales, because of attendant circumstances of the transaction and in reliance upon acts rather than words of the parties. A contract is understood, but a contract evinced sufficiently by mutual conduct, with proof of a promise." Schouler, Pers. Prop., 3 ed., § 342.

by law? That is because, in the absence of circumstances negativing the existence of an implied warranty, the court will not let a jury find that there is none. All the jury has to do is to find that a certain situation exists and the court supplies the implication of warranty.[1] An implied warranty, where the proper situation for it exists, is a contract conclusively implied as a fact by the court.[2]

The line between an implied warranty and a quasi-contract is hard to draw, because an implied warranty, like a quasi-contract, is in theory affirmed only because substantial justice seems to demand it;[3] yet it is never to be forgotten that, unlike a quasi-contract, an implied warranty is founded on the presumed intent of the parties,[4]

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[1] "Implied warranties are not conclusions or inferences of fact drawn by a jury; but they are the conclusions or inferences of law pronounced by the court upon facts admitted or proved before the jury." Osgood *v.* Lewis, 2 Har. & G. (Md.) 495, 519.

"It must now be taken to be the law . . . that where property is sold by sample there is an implied warranty that the article corresponds with the sample. . . . In the absence of proof to rebut the presumption it is of equal efficacy to charge the vendor as if the seller had expressly said, 'I warrant them to correspond with the description or representation.'" Borrekins *v.* Bevan, 3 Rawle (Pa.) 23, 36.

[2] "I think the facts were so clear and undisputed that the court could, without error, have decided as a question of law that there was a warranty." Earl, C., in Hawkins *v.* Pemberton, 51 N. Y. 198, 207.

Because an implied warranty is a contract implied in fact, it may be proven under a general averment in a complaint that the defendant warranted an article. Rogers *v.* Beckrich, 46 N. Y. App. Div. 429; Long *v.* Armsby Co., 43 Mo. App. 253. See Misner *v.* Granger, 9 Ill. 69; Hoe *v.* Sanborn, 21 N. Y. 552; Cleveland Linseed Oil Co. *v.* Buchanan, 120 Fed. Rep. 906.

[3] "A warranty should only be implied when good faith requires it." Parker, J., in McCoy *v.* Artcher, 3 Barb. (N. Y.) 323, 330.

The rule of *caveat emptor* has so been modified by express and implied warranties that Mr. Schouler says: "We may well conclude that this rule of *caveat emptor* doubles upon itself; indeed, between court and jury it has come to be applied flexibly so as usually to satisfy the demands of substantial justice in each individual case." Schouler, Pers. Prop., 3 ed., § 343.

[4] "Now an implied warranty, or, as it is called, a covenant in law as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have." Bowen, L. J., in The Moorcock, L. R. 14 P. D. 64, 68.

"Here, if we were to imply such a contract as is suggested, we should, as it seems to me, be incurring great danger of implying something that neither party ever intended." Kay, L. J., in Hamlyn *v.* Wood, [1891] 2 Q. B. 488, 495.

and hence, though implied in general in the interests of substantial justice, answers to other tests than those of unconditioned equity.[1] The real or imaginary business needs of a situation may lead to the implication of a warranty presumably intended by the parties where the law of quasi-contracts demands a different solution of the difficulty.

An example of the struggle between implied warranty and quasi-contract, full of significance for the question of change of position, is found in the controversy over Price *v.* Neal[2] and kindred cases. That the drawee of a bill of exchange or check cannot recover money paid by him under mistake as to the genuineness of the drawer's signature,[3] or as to the state of his account,[4] yet is allowed to recover where the mistake is as to the alteration of the body of the bill or check,[5] is inexplicable to one who does not see in the result a compromise between the law of quasi-contracts and the law of implied warranty.[6] On the one hand you have the broad equitable doctrine, "that as between two persons having equal equities, one of whom must suffer, the legal title shall prevail,"[7]

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[1] A warranty will not be implied where there is an express warranty. See 2 Mechem, Sales, § 1259, and cases cited. A few late cases are Reynolds *v.* General Electric Co., 141 Fed. Rep. 551; La Crosse Plow Co. *v.* Helgeson, 106 N. W. Rep. 1094 (Wis.); Gaar Scott & Co. *v.* Hodges, 90 S. W. Rep. 580 (Ky.). And it will not be implied where there is a refusal to give an express warranty. Hartin Com. Co. *v.* Pelt, 88 S. W. Rep. 929 (Ark.).

[2] 3 Burr. 1354. See the admirable article by Professor Ames on "The Doctrine of Price *v.* Neal" in 4 HARV. L. REV. 297.

[3] 4 HARV. L. REV. 297, and cases cited. See First Nat'l Bank of Belmont *v.* First Nat'l Bank, 58 Oh. St. 207. But see the curious reactionary decision of First Nat'l Bank *v.* Bank of Wyndmere, 108 N. W. Rep. 546 (N. D.), noted in 20 HARV. L. REV. 145.

[4] 4 HARV. L. REV. 305, and cases cited; Riverside Bank *v.* First Nat'l Bank, 74 Fed. Rep. 276. On this point there are a few contrary decisions. See *ibid.*

[5] 4 HARV. L. REV. 306, and cases cited.

[6] Professor Keener in his excellent treatise on Quasi-Contracts said of these decisions (p. 158, n.): "It is submitted that on no theory of quasi-contracts can the decisions reached in the cases . . . be reconciled or the results reached in many of the cases be justified."

[7] Professor Ames in "The Doctrine of Price *v.* Neal," 4 HARV. L. REV. 297-299. See Holley *v.* Domestic and Foreign Miss. Soc., 180 U. S. 284. Curiously enough, Professor Keener could not see that in Price *v.* Neal the equities *are* equal. Keener, Quasi-Contracts, 155, 156. He could see clearly enough that a defendant's innocent change of position subsequent to the plaintiff's mistaken payment should be a complete defense, although that change of position, to use his phrases about Price *v.* Neal, is a transaction complete in itself and follows in point of time the entirely independent transaction between the plaintiff and the defendant (Keener, Quasi-Contracts, 59-74); but he did not appreciate that Price *v.* Neal is really a case of change of position, although the defendant's change of position took place *before*

which is given due application where a drawer's signature is forged and, by the better opinion, where he had no funds in bank; but on the other hand you have first the broad legal doctrine that by contract express or implied in fact the parties may disregard this equitable doctrine,[1] and then the business instincts of the judges insisting that the parties have disregarded it by a contract implied in fact where payment is made on a raised check.[2] In any event

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instead of *after* the plaintiff's mistaken payment. It is true that, where the change of position takes place after the plaintiff's payment, one is apt to feel that the plaintiff induced the change, — a feeling which necessarily is absent where the change of position takes place before plaintiff pays; yet if that feeling of causation is to affect one's appraisal of the equities — and where plaintiff is innocent and careful in making the payment it seems wholly wrong to let it do so — it can only make one say that the defendant's equity is superior to the plaintiff's in such a case. It certainly ought not to make one say that in Price *v.* Neal the equities are not equal; for it is the innocent change of position, as such, of the defendant in whatever order of time it occurs, that gives him an equity equal to that of the innocent change of position, as such, of the plaintiff, found in the latter's mistaken payment. As a matter of fact the courts in the change of position cases do not seem to be influenced by the causation idea where negligence is not a factor, and accordingly we find some courts which follow Price *v.* Neal allowing a recovery against a defendant whose position has changed since the payment. So the fact that a defendant's knowledge of the forgery, acquired after he gets the forged paper and before the plaintiff pays, will keep his equity from equalling the plaintiff's equity, is troublesome to Professor Keener (Quasi-Contracts, 156) just because he does not see that the defendant is as much to blame in such a case for the plaintiff's payment as a plaintiff is to blame for a defendant's change of position where the plaintiff pays innocently, but after discovering the mistake is negligent about notifying the defendant, who after such negligence innocently changes his position. Professor Keener's insistence that the loss should be thrown on the plaintiff in the last-mentioned situation (Quasi-Contracts, 72, 73), logically requires him to throw it on the defendant in the first-mentioned case. The situation which the parties occupied at the time the plaintiff made his payment would seem to be entitled to no peculiar importance when the *relative* equities of the parties are involved, as the cases on change of position show.

[1] For instance, all must agree that a holder of a check who should expressly guarantee to the drawee the genuineness of the drawer's signature could not rely on the equitable doctrine as a defense. *Cf.* Second Nat'l Bank *v.* Guarantee, etc., Co., 206 Pa. St. 616.

[2] Even with reference to payment on a forged drawer's signature, we have some writers calling for the implication of a warranty. We have Mr. Daniels in his work on Negotiable Instruments insisting that a warranty should be implied in such a case, and we have Professor Ames insisting that it should not. The victory is with Professor Ames, because both equitable principle and the presumed intention of the parties agree that the drawee should stand the loss. The common understanding of the business world today undoubtedly is that the drawee must know at his peril the drawer's signature, and that the holder impliedly warrants nothing as to that; and consequently equitable principle has in such a case no contract implied in fact to modify or nullify it. *Cf.* the remarks of Holmes, C. J., in Dedham Nat'l Bank *v.* Everett Nat'l Bank, 177 Mass. 392, 395.

the fact that an implied warranty is a contract implied in fact, and as such must prevail, as effectually as an express contract would, over any general obligation which in the absence of an actual contract the law would raise, would seem to be the key to the mystery of the conflict in the above cases of payments on forged paper; [1] and even if one concludes that the feeling of the judges as to what must have been the underlying understanding of business people has been allowed to overcome equitable principle where it should not have done so, it is consoling to know that the error, if it be one, is due rather to poor business judgment than to defective legal conscience.[2]

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[1] The cases of payment under a mistake as to a forged indorsement have been fully discriminated from Price *v.* Neal, on the ground that the defendant takes the legal title as trustee for the real owner of the paper, and that the payor, who on principle should sue the defendant only after he has paid the real owner and been subrogated to his rights, has for practical reasons been allowed a direct action against the defendant before he has paid the real owner. See Professor Ames, 4 HARV. L. REV. 297, 307. This result is, of course, supported also by the considerations already discussed where a check has been raised in amount. Where the holder expressly guarantees the genuineness of all indorsements in his chain of title, the payor's right to recover is unquestioned. Second Nat'l Bank *v.* Guarantee, etc., Co., 206 Pa. St. 616. And if it is proper to say that the parties presumably intend such a guaranty where nothing is said, a contract implied in fact that the endorsement is genuine makes a defendant liable. For the reasons suggested by Professor Ames, however, it would seem to be unnecessary to imply such a contract, though the possibility of the implication serves to explain why the payor can recover without first paying the real owner of the paper. On the effect of change of position where there has been payment on a forged indorsement, see London and Riverplate Bank *v.* Bank of Liverpool, [1896] 1 Q. B. 7.

[2] The statement of Holmes, C. J., in Dedham Nat'l Bank *v.* Everett Nat'l Bank, 177 Mass. 392, 395, about the rule in Price *v.* Neal that, "Probably the rule was adopted from an impression of convenience rather than from any more academic reason," would seem to be the opposite of the fact. It apparently was adopted because of general equitable principle (see Professor Ames in 4 HARV. L. REV. 299, 300), and was retained because it did not conflict with the presumed intention of the parties. That it did not so conflict Mr. Justice Holmes makes plain in the rest of his opinion.

Cases such as Leather *v.* Simpson, L. R. 11 Eq. 398, and Goetz *v.* Bank, 119 U. S. 551, where a drawee who pays genuine bills of exchange accompanied by forged bills of lading is not allowed to recover because the equities of the parties are equal, present sharply the question of whether a warranty should not be implied. Why imply a warranty where the body of a bill of exchange has been altered, and not imply one where a forged bill of lading accompanies a genuine bill of exchange? The feeling that the unexpressed but actual understanding of the parties requires the implication of a warranty in the bill of lading cases would seem to be the only excuse for the decision in Guarantee Trust Co. *v.* Grotrian, 114 Fed. Rep. 433, where a United States Circuit Court of Appeals held that the fact that the bill of exchange, which was accompanied by forged bills of lading for flax seed, was accepted "against indorsed bills of lading for 8417 bushels of flax seed," would allow the plaintiffs to recover the subsequent payment because "under their conditional acceptance the plaintiffs had a right

II.

THE RELATION OF AGENCY TO QUASI-CONTRACTS.

The relation of implied warranty to quasi-contracts having been explained, very little need be said about the relation of agency to quasi-contracts. Agency and quasi-contracts touch on the subject of change of position. It is held that an agent who acts for a disclosed principal and, without knowing that a payment has been made to him by mistake of fact, turns the money over to his principal, is freed from liability to the payor;[1] but that an agent who purports to act for himself and not for a principal has no defense in the fact of payment to his principal, even if the latter has since become insolvent.[2]

The reason why the agent for the undisclosed principal remains liable, despite a settlement with the principal, is that the agent impliedly warrants that he has acted for no one but himself, and must abide by the consequence of that warranty. The cases do not call it implied warranty, but that is clearly what it amounts to. The defendant is held impliedly to have represented that he was a principal and to have promised in fact, though not expressly, to remain such, and hence is not allowed to show any change of position which has taken place solely because the implied promise is false. Here, again, if the courts are in error, their fault is one of business judgment and not of conscience; it is the presumed intention of the parties — their understanding implied in fact[3] — that the courts allow to override the general notions of equity.

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to genuine documents and to rely upon the genuineness of those delivered upon the discharge of their obligation."

[1] Holland *v.* Russell, 4 B. & S. 14; Ellis *v.* Goulton, [1893] 1 Q. B. 350; McDonald *v.* Napier, 14 Ga. 89; Mowatt *v.* McClelan, 1 Wend. (N. Y.) 173; Nat'l Park Bank *v.* Seaboard Bank, 114 N. Y. 28. See Smith *v.* Binder, 75 Ill. 492; Shand *v.* Grant, 11 C. B. (N. S.) 324. And see Continental, etc., Co. *v.* Kleinwort, 90 L. T. R. 474. See also cases of payment over by an administrator, Grier *v.* Huston, 8 Serg. & R. (Pa.) 401; Beam *v.* Copeland, 54 Ark. 70; and by a public officer, Dickey Co. *v.* Hicks, 103 N. W. Rep. 423 (N. D.).

[2] Newall *v.* Tomlinson, L. R. 6 C. P. 405; First Nat'l Bank of Minneapolis *v.* Holyoke Nat'l Bank, 182 Mass. 130; Canal Bank *v.* Bank of Albany, 1 Hill (N. Y.) 287; Holt *v.* Ross, 54 N. Y. 472; Merchants Bank *v.* McIntyre, 2 Sandf. (N. Y.) 431; Smith *v.* Kelly, 43 Mich. 390. See United States *v.* Pinover, 3 Fed. Rep. 305, 309, and Continental, etc., Co. *v.* Kleinwort, 90 L. T. R. 474.

[3] "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract." Lord Denman, C. J., in Humble *v.* Hunter, 12 Q. B. 310, 317.

Now we are ready for our discussion of the cases on change of position. The first thing to do is to define our terms.

III.

CHANGE OF POSITION AS A DEFENSE.

The words "change of position" are used here simply in the ordinary sense of such a change in the situation of the defendant, in consequence of the mistake in payment,[1] as will entail financial loss to him if he has to make repayment. That change may consist in the loss of a legal right on the very claim or instrument upon which the payment is made,[2] or in the giving up of property,[3] or in delay in getting at the person really liable,[4] or in the payment of money [5] to third persons.[6] Such a change of position may mean a total or only a partial loss, and, if the latter, can be of course only *pro tanto* a defense.[7]

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1 Where it is not in consequence of the payment, change of position is immaterial. See Continental, etc., Co. *v.* Kleinwort, 51 Wkly. Rep. 541, and on appeal in 90 L. T. R. 474; Nat'l Bank of Commerce *v.* Nat'l Banking Ass'n, 55 N. Y. 211. It is only by showing that but for the mistake he would not have changed his position, that the defendant can get any equity. Causation is necessary to make his change of position part of the same transaction as the plaintiff's mistaken payment, but that causation need not impute any blame to the plaintiff.

2 See Pooley *v.* Brown, 11 C. B. (N. S.) 566; Watson *v.* Moore, 33 L. T. R. 121; Behring *v.* Somerville, 63 N. J. L. 568.

3 See Walker *v.* Conant, 69 Mich. 321.

4 Continental Nat'l Bank *v.* Nat'l Bank of Commonwealth, 50 N. Y. 575; Boas *v.* Updegrove, 5 Pa. St. 516. The dictum *contra* in Standish *v.* Ross, 3 Ex. D. 527, cannot be supported. It is only a dictum, because prior to the sheriff's levy the defendant's attorney knew of the defect in the defendant's title, and the defendant therefore had no defense against the sheriff who had acted innocently; for the defendant alone was to blame and should bear the loss. See cases under III (b), *infra*.

5 See Crocker Woolworth Bank *v.* Nevada Bank, 139 Cal. 564; Union Bank *v.* Ontario Bank, 24 Lower Can. Jur. 309.

6 Since there seem to be no cases where change of position has been claimed because the defendant afterward lost the identical money paid him, or had it stolen from him, before confusing it with his own, that case is not considered, though it is submitted that on principle such a change of position should be a complete defense.

Whether, as was intimated in Sir Charles Brisbane *v.* Dacres, 5 Taunt. 144, and in Skyring *v.* Greenwood, 4 B. & C. 281, a change of position is made out by showing that because of the mistaken payment the defendant has altered his mode of living, is open to doubt, since it must be assumed that the defendant has had his money's worth of enjoyment. Yet to allow a recovery where the defendant has proved beyond a reasonable doubt that the mistake caused the change in the defendant's habits of life may in some cases work great hardship on the defendant. It is probably no defense, but the matter is not concluded by authority.

7 See Bean *v.* Copeland, 54 Ark. 70.

And now we are prepared for the cases. In considering them it is desirable to follow Professor Keener's classification.[1]

(a) The plaintiff alone is negligent or is more at fault than the defendant.

If the defendant has not altered his position in consequence of the mistake, it is no defense to him that the plaintiff was more negligent than the defendant or that the plaintiff alone was negligent;[2] but where the defendant has changed his position in consequence it is a defense.[3] It being the plaintiff's own fault that one of them must suffer a loss, he and not the defendant should suffer it.

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1 "Is it against conscience for a defendant to retain money paid to him under mistake, when the circumstances are such that the parties can no longer be put in *statu quo* and the repayment thereof will throw a loss upon him? This question may arise where, but for the negligence of the plaintiff, the mistake would not have been made; where the mistake was due to the negligence of the defendant; where neither the plaintiff nor the defendant can be said to have been negligent; where, if the plaintiff was negligent the defendant was equally negligent; or where, though there was no negligence at the time of payment, the plaintiff had been guilty of laches in asserting his rights." Keener, Quasi-Contracts, 59.

2 Kelley *v.* Solari, 9 M. & W. 54; Townsend *v.* Crowdy, 8 C. B. (N. S.) 477; Imperial Bank of Canada *v.* Bank of Hamilton, [1903] A. C. 49; Appleton Bank *v.* McGilvray, 4 Gray (Mass.) 518; Merchants Bank *v.* Eagle Bank, 101 Mass. 281; Union Nat'l Bank *v.* Sixth Nat'l Bank, 43 N. Y. 452; Lawrence *v.* American Nat'l Bank, 54 N. Y. 432; McKibben *v.* Doyle, 173 Pa. St. 579; Rutherford *v.* McIvor, 21 Ala. 750; Young *v.* Lehman, 63 Ala. 519; First Nat'l Bank *v.* Behan, 91 Ky. 560; Fraker *v.* Little, 24 Kan. 598; Douglas County *v.* Keller, 43 Neb. 635; Alston *v.* Richardson, 51 Tex. 1; Devine *v.* Edwards, 101 Ill. 138; Brown *v.* College Corner Co., 56 Ind. 110; City Nat'l Bank *v.* Peed, 32 S. E. Rep. 34 (Va.); U. S. *v.* Park Bank, 6 Fed. Rep. 852. There are cases *contra*. See Keener, Quasi-Contracts, 70, n. 2.

3 Deutsche Bank *v.* Beriro, 73 L. T. R. 669; Continental Nat'l Bank *v.* Tradesmen's. Bank, 173 N. Y. 272; Walker *v.* Conant, 65 Mich. 194; Wilson *v.* Barker, 50 Me. 447; Fegan *v.* Great Northern Ry. Co., 9 N. D. 30; Richey *v.* Clark, 11 Utah 467; Maher *v.* Miller, 61 Ga. 556; German Security Bank *v.* Columbia, etc, Co., 27 Ky. L. Rep. 581; Pelletier *v.* State Nat'l Bank, 41 So. Rep. 640 (La.). See also Mayer *v.* Mayor of New York, 63 N. Y. 455; DeNayer *v.* State Nat'l Bank, 8 Neb. 104, 108.

While no implied warranty as to the genuineness of the body of a check arises from certification, and it is not necessarily negligent to certify checks previously altered and then pay them (Metropolitan Nat'l Bank *v.* Merchants Nat'l Bank, 182 Ill. 367; 5 Cyc. 542), or to pay a certified check altered after certification (Nat'l Bank of Commerce *v.* Nat'l, etc., Ass'n, 55 N. Y. 211; Imperial Bank of Canada *v.* Bank of Hamilton, [1903] A. C. 49; Clews *v.* Bank of New York, etc., Ass'n, 89 N. Y. 418; but see same case 114 N. Y. 70), it is negligence estopping the plaintiff from suing for it to adopt a forged certification and to pay a defendant who thereupon innocently changes his position. Continental Nat'l Bank *v.* Nat'l Bank, 50 N. Y. 575. See 5 Cyc. 543. Moreover, if there is actual negligence, the certifying bank cannot recover the money paid on the raised check to one who has since changed his position. Continental Nat'l Bank *v.* Tradesmen's Bank, *supra.*

(b) The defendant alone is negligent or is more at fault than the plaintiff.

For the same reason, in either of these situations, the defendant must bear the loss;[1] and this is true where the negligence of his agent is imputed to him.[2]

(c) Neither party is negligent.

It is here that we experience difficulty with the cases. The title to the money paid having vested in the defendant,[3] and the plaintiff having no right to recover it unless it is unconscientious for the defendant to refuse restitution, equitable principle would seem clearly to require that a defendant who has altered his position because of a mistaken payment for which he is not to blame should be excused *pro tanto* from repayment. "The principle which forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself at the expense of an innocent and blameless defendant."[4] But this equitable principle has been disregarded in some of the cases. So far as it has been departed from because of contracts express or implied in fact which are inconsistent with its application, and most of the cases come under this head, the writer has nothing to say here. The cases where the defendant is estopped to set up a change of position because of his indorsement,[5] or because of his implied warranty, or because he failed to disclose that he was acting for a principal with whom he has since settled, represent a conflict between equitable principle and real or supposed business under-

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[1] Union Bank *v.* U. S. Bank, 3 Mass. 74; Phetteplace *v.* Bucklin, 18 R. I. 297. See White *v.* Continental Bank, 64 N. Y. 617; Rose *v.* Shore, 1 Call (Va.) 540. And see the cases where the plaintiff is in the same situation as that of Price *v.* Neal, except that the defendant's negligence is the approximate cause of the loss, and the plaintiff is allowed to recover. Canadian Bank of Commerce *v.* Bingham, 31 Wash. 484; People's Bank *v.* Franklin Bank, 88 Tenn. 299; Nat'l Bank of N. A. *v.* Bangs, 106 Mass. 441; First Nat'l Bank of Danvers *v.* First Nat'l Bank of Salem, 151 Mass. 280; Ellis *v.* Ohio Life, etc., Co., 4 Oh. St. 628 (and see First Nat'l Bank *v.* First Nat'l Bank, 58 Oh. St. 207); First Nat'l Bank of Orleans *v.* State Bank of Alma, 22 Neb. 769; First Nat'l Bank of Quincy *v.* Ricker, 71 Ill. 439; Rouvant *v.* San Antonio Nat'l Bank, 63 Tex. 610; First Nat'l Bank *v.* First Nat'l Bank, 4 Ind. App. 355. But see Commercial, etc., Bank *v.* First Nat'l Bank, 30 Md. 11, where the defendant's change of position was apparently allowed to condone his negligence.

[2] Standish *v.* Ross, 3 Ex. D. 527, where the knowledge of the defendant's attorney was imputed to him, while the plaintiff had acted innocently.

[3] Keener, Quasi-Contracts, 63–65.

[4] Keener, Quasi-Contracts, 67. See also the sound dictum in Guile *v.* Balbridge, 2 Swan (Tenn.) 295.

[5] That which is an indorsement in form may in fact be only a receipt for payment. First Nat'l Bank *v.* Holyoke Nat'l Bank, 182 Mass. 130. See 4 HARV. L. REV. 302.

standing, and if the business understanding actually is satisfied by them, or reasonably so, it is probably more important to have the rule certain than to have it settled in any given way.[1]

But there is no excuse for the departure from equitable principle where the actual understanding of the parties cannot be called in to justify it. The cases, therefore, where no express contract exists and no question of implied warranty or misrepresentation as to agency is involved, and yet the plaintiff is allowed to recover against an equally innocent defendant who has suffered an irrevocable change of position, must be condemned unqualifiedly. Fortunately the latter cases are few,[2] and once they are discriminated from the cases where contracts express or implied in fact are asserted, it ought not to be hard to get them overruled, especially as they are squarely opposed by cases in other jurisdictions.[3] Certainly the chances of a reversal, and of keeping new jurisdictions from following these erroneous cases, are greatly increased by showing that these cases form a class by themselves because there is in them no undertaking implied in fact to interfere with equitable principles.[4]

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[1] "But even if the decisions had originated the difference without adequate ground, when once it exists its existence is a sufficient reason for continuing to decide in accordance with it." Holmes, C. J., in Dedham Nat'l Bank *v.* Everett Nat'l Bank, 177 Mass. 392, 396.

[2] They are Durrant *v.* Ecclesiastical Commissioners, 6 Q. B. D. 234; Kingston Bank *v.* Eltinge, 40 N. Y. 391; Bank of Toronto *v.* Hamilton, 28 Ont. 51; and see Phetteplace *v.* Bucklin, 18 R. I. 297; Koontz *v.* Central Nat'l Bank, 51 Mo. 275.

[3] Crocker Woolworth Bank *v.* Nevada Bank, 139 Cal. 564; Behring *v.* Somerville, 63 N. J. L. 568; Boas *v.* Updegrove, 5 Pa. St. 516; Union Bank of Lower Canada *v.* Ontario Bank, 24 Lower Can. Jur. 309. See Pensacola, etc., Co. *v.* Braxton, 34 Fla. 471.

[4] In England Durrant *v.* Commissioners, *supra*, which "is difficult to explain, unless by reason of the relative positions in life of the parties the defendant should be held responsible for the consequences of the mistake" (Professor Ames, 4 HARV. L. REV. 310, n.), might easily be overruled, for the court was mistaken in supposing it to be sustained by Cocks *v.* Masterman, 9 B. & C. 902 (see Keener, Quasi-Contracts, 66, 67), and seemingly overlooked the earlier case of Watson *v.* Moore, 33 L. T. R. 121. See also Pooley *v.* Brown, 11 C. B. (N. S.) 566.

In New York, Kingston Bank *v.* Eltinge, 40 N. Y. 391, has been approved in dicta and has been supposed to be supported by Corn Exchange Bank *v.* Nassau Bank, 91 N. Y. 74, but the latter case was a case of forged indorsement and hence governed by different considerations. The later New York cases are not unfriendly to a change from Kingston Bank *v.* Eltinge. See Continental Nat'l Bank *v.* Tradesmen's Bank, 173 N. Y. 272, where the court recognized the equity of the defendant's change of position, and said that the plaintiff could not recover even if it did not owe any duty to the defendant in particular, but simply owed a general duty. See also Nat'l Park Bank *v.* Seaboard Bank, 114 N. Y. 28. The fact that in Kingston Bank *v.* Eltinge,

The doctrine of Durrant *v.* Commissioners[1] and its small following, that the irrevocable change of position of the defendant is immaterial where there is no "mutual relation between the parties creating a duty on the part of the plaintiff" to the defendant, misconceives the situation altogether. The defendant has the legal title to the money and can be deprived of it only where it is inequitable for him to keep it; but where the defendant's situation has changed in consequence of the mistake, so that repayment would leave him with a total loss, it is clearly not inequitable for him to keep it. The question is not whether the plaintiff owes a duty to the defendant, but whether the defendant has been excused from the obligation to repay.

This point is brought out clearly in the late case of Crocker Woolworth Bank *v.* Nevada Bank.[2] It is almost never that a check case can present the equitable situation freed from questions of implied warranty and of agency, but this case seems to do it. For reasons not material and not defended here, the California court held that the plaintiff had paid the defendant a raised check on a so-called indorsement so restricted that the defendant was not liable on the indorsement; that the defendant incurred no implied liability from presenting the check for payment so indorsed; and that the defendant did not impliedly or otherwise represent to the plaintiff that the defendant was acting as a principal. That left the situation simply one of payment by an innocent mistake of the plaintiff, receipt by an innocent mistake of the defendant, and an innocent change of position by the defendant in the subsequent payment of most of the money over to its depositor. The California court thereupon properly held that the equities were equal, and that the plaintiff could not recover the money the defendant had paid over to its depositor.[3]

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40 N. Y. 391, the court wrongly considered "that the plaintiff had the legal title although the money had been paid to the defendant by the plaintiff's consent" (4 HARV. L. REV. 310, n.), coupled with the fact that the decision did not even determine finally the rights of the parties to the action, — the defendant ultimately obtained a judgment on other grounds (Kingston Bank *v.* Eltinge, 66 N. Y. 625), — ought to make a reversal feasible.

Ontario would doubtless sooner or later follow England, if the latter should change, especially as one Canadian case announces the right rule. Union Bank *v.* Ont. Bank, 24 Lower Can. Jur. 309.

[1] 6 Q. B. D. 234.

[2] 139 Cal. 564.

[3] As a decision on the subject of change of position, the California case is not seriously impaired by the general doctrine that where it appears from the indorsement that the collecting bank is acting merely as agent, it cannot be made to refund if it has

(d) The parties are equally negligent.

It seems clear that in a jurisdiction where no recovery is allowed if both parties are free from blame as to the mistake, no recovery will be allowed where they are equally to blame. The defendant has the legal title to the money and the equity of a change of position, while the plaintiff has no superior equity. Indeed, the plaintiff should no more recover here than where he alone is to blame, for "the fact being that but for the negligence of the plaintiff no loss would have been incurred, the law should leave the loss where it finds it."[1] In a jurisdiction where recovery is allowed despite the fact that the defendant is not to blame and has innocently changed his position, recovery will be allowed where the parties are equally to blame.[2] If the defendant has not changed his position, the plaintiff will, of course, recover.[3]

(e) The plaintiff has been guilty of negligence about notifying the defendant of the mistake.

Since there can be no recovery where the plaintiff alone was negligent and the defendant suffered a loss, it is just as true that there can be no recovery where money is paid by mistake and the plaintiff, even though careful at the time, is negligent about notifying

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paid over the money to its principal before notice of the mistake. Nat'l Park Bank *v.* Seaboard Bank, 114 N. Y. 28. The reason why it is not so impaired is that the court does not hold that the indorsement — "pay only through the clearing-house" — gave notice of agency, but simply said that in view of that indorsement the plaintiff could not say that the defendant represented anything more than the fact that the defendant was the holder of the check (139 Cal., at p. 582). To be sure, on the same page the court refers to the "general practice" proven for banks not to buy, but to take for collection only, local checks such as the one paid by plaintiff, but even that general practice is not relied on to show that plaintiff knew that defendant was an agent; — it is simply referred to in order to negative the claim of the plaintiff that plaintiff had the right to infer that the defendant received payment as owner of the check or acted upon any such inference. No doubt if it had been necessary, the court would have held that the plaintiff knew that defendant was an agent, as it shows on pp. 582–583 that there was evidence that the plaintiff did know that fact, but the court preferred to rest its decision on the broad equitable principle announced in Holley *v.* Missionary Society, 180 U. S. 284. See 139 Cal., at pp. 570–573.

[1] Keener, Quasi-Contracts, 72. See Pooley *v.* Brown, 11 C. B. (N. S.) 566, where the mistake was treated by the majority of the court as one of law, and both parties being at fault, the plaintiff was not allowed to recover against a defendant whose position was changed. The case of Behring *v.* Somerville, 63 N. J. L. 568, seems to be a case where neither party was actually negligent, but might be cited here.

[2] Koontz *v.* Central Nat'l Bank, 51 Mo. 275. In Union Bank *v.* Bank of U. S., 3 Mass. 74, the court seems to have regarded the defendants as more negligent than the plaintiff, — "they committing the first fault." The same seems true of Clark *v.* Eckroyd, 12 Ont. App. 425.

[3] Devine *v.* Edwards, 87 Ill. 177.

the defendant after the plaintiff discovers the mistake, and in consequence the defendant innocently changes his position.[1]

CONCLUSION.

In closing it should be said that if this paper has made any clearer the problem before the court in the kind of cases here discussed, it has served its end. This particular field has been somewhat neglected, so that exposition rather than argument is needed. Our exposition has disclosed that except in a few jurisdictions change of position caused by a payment made under mistake of fact, for which mistake the defendant is not responsible, is a complete defense to an action to recover the money, unless by express contract or by a contract implied in fact the defendant has put it out of his power to make use of the defense.

It should be added that except in the few jurisdictions which allow a plaintiff to throw the loss upon an equally innocent defendant by taking from such defendant that title to the money which the plaintiff himself conferred upon the defendant, it is impossible to assert positively that the results reached by the courts are erroneous. It being conceded, as under our common law system it must be, that the general equitable doctrine that where the equities are equal the legal title must prevail has no application where by actual contract, that is, by express contract or by contract implied in fact, the parties agree that it shall not apply, the cases which find such an implied actual contract to exist rest upon an assumed general business understanding which is extremely difficult, if not impossible, to disprove. For that reason it is believed that they are now invulnerable to attack except through legislation. But vigorous protest may be effective, and therefore must still be raised, against those cases where equitable principle as such has been violated by the courts.

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[1] Skyring *v.* Greenwood, 4 B. & C. 281; Pooley *v.* Brown, 11 C. B. (N. S.) 566; Iron City Nat'l Bank *v.* Ft. Pitt Nat'l Bank, 159 Pa. St. 46; U. S. *v.* Clinton Nat'l Bank, 28 Fed. Rep. 357; Third Bank *v.* Merchant's Bank, 76 Hun (N. Y.) 475; Continental Nat'l Bank *v.* Metropolitan Nat'l Bank, 107 Ill. App. 455. And see London and River-plate Bank *v.* Bank of Liverpool, [1896] 1 Q. B. 7; Bank of St. Albans *v.* Farmers', etc., Bank, 10 Vt. 141.

The case of Iron City Nat'l Bank *v.* Ft. Pitt Nat'l Bank, *supra*, is in point on this question of change of position solely because a statute has changed the rule of Price *v.* Neal in Pennsylvania. See Corn Exchange Nat'l Bank *v.* Nat'l Bank of the Republic, 78 Pa. St. 233.